

N.D.A.G. Letter to Kretschmar (Aug. 1, 1985)

August 1, 1985

Mr. William E. Kretschmar
Ashley City Attorney
P.O. Box 46
Ashley, ND 58413

Dear Mr. Kretschmar:

Thank you for your letter of July 9, 1985, wherein you inquire whether a restaurant could qualify as a new industry that is eligible for an exemption from property taxation pursuant to the provisions of N.D.C.C. Ch. 40-57.1.

Enclosed for your review is a copy of the 1976 N.D. Op. Att'y Gen. 181 which concluded that service businesses, including restaurants, do not qualify for a new industry tax exemption.

For the following reasons, I agree with the conclusion reached in this opinion that a restaurant cannot qualify for a new industry tax exemption:

When first enacted, N.D.C.C. §40-57.1-02 read as follows:

SECTION 2. "PROJECTS" AND MUNICIPALITIES" DEFINED. As used in this chapter, unless a different meaning clearly appears from the context, the term "municipality" shall include counties as well as municipalities of the types listed in section 40-01-01, subsection 1 and the term "project" shall mean any real property, buildings and improvements on real property or the buildings thereon, and any equipment permanently located on such real property or in such buildings, which are used or useful in connection with revenue producing enterprises, or any combination of two or more such enterprises, engaged or to be engaged in:

1. Assembling, fabricating, manufacturing, mixing, or processing of any agricultural, mineral, or manufactured products, or any combination thereof.
2. Storing, warehousing, distributing, or selling any products of agriculture, mining, or manufacture.
3. Any other industry or business not prohibited by the Constitution or laws of the state of North Dakota.

1969 N.D. Sess. Laws, Ch. 385, §2.

The 1973 Legislative Assembly amended and reenacted N.D.C.C. §40-57.1-02 and, in doing so, eliminated the following language:

3. Any other industry or business not prohibited by the constitution or laws of the state of North Dakota.

1973 N.D. Sess. Laws 341, §2.

After reviewing the legislative history file, I agree that the 1973 Legislative Assembly intended to exclude restaurants and other service businesses from qualifying from the new industry exemption provisions.

In 1975 N.D. Op. Att'y Gen. 188, it was concluded that a large retail discount store could qualify under the new industry exemption provisions.

The 1977 Legislative Assembly amended and reenacted N.D.C.C. §40-57.1-02 as follows:

40-57.1-02. "PROJECTS" AND "MUNICIPALITIES" DEFINED. As used in this chapter, unless a different meaning clearly appears from the context, the term "municipality" shall include counties as well as municipalities of the types listed in section 40-01-01, subsection 1, and the term "project" shall mean any real property, buildings and improvements on real property or the buildings thereon, and any equipment permanently located on such real property or in such buildings, which are used or useful in connection with revenue-producing enterprises, or any combination of two or more such enterprises, engaged or to be engaged in:

1. Assembling, fabricating, manufacturing, mixing, or processing or any agricultural, mineral, or manufactured products, or any combination thereof, including the retail sale of any such product by the enterprise that assembled, fabricated, manufactured, mixed, or processed it and the incidental sale of any service of a kind essential to the primary activities of the enterprise .
2. Storing, warehousing, distributing, or selling any products of agriculture, mining, or manufacturing, provided that "selling" shall not include the sale of any service except storing, warehousing, and distributing or as provided in subsection 1 nor shall it include the sale at retail of any product except as provided in sub- section 1. (Emphasis supplied).

1977 N.D. Sess. Laws 391, §2.

The underlined language represents the 1977 amendment.

Thus, since the 1977 amendment, a large retail discount store cannot qualify under the new industry exemption provisions unless it came under the special circumstances set forth in the 1977 amendment.

Thus, a review of the legislative history of N.D.C.C. 40-57.1-02 reveals that the Legislative Assembly has clearly intended to limit the kinds of enterprises which can qualify for the tax exemption for new industries. It is clear that the 1973 and 1977 Legislative Assemblies did not want restaurants to qualify for new industry property tax exemption.

I am very conscious and supportive of the efforts that are necessary to stimulate and preserve the success of business communities in our smaller cities. It is my hope that appropriate legislative action will be taken by the next Legislative Assembly which will enable our smaller cities to prevent the loss of their businesses.

Please do not hesitate to contact me if you wish to discuss this matter further.

Sincerely,

Nicholas J. Spaeth

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Enclosure

cc: Kent Conrad, Tax Commissioner & Secretary of the State Board of Equalization